CITY OF RICHMOND *v.* CHEATWOOD.

June 23, 1921.

[107 S. E. 830.]

1. Waters and Water Courses (§ 171 (2)*)—Duty to Provide for Floods Defined.—No person or corporation has a right to construct a culvert over a natural water course in such a manner as to obstruct the flow of the stream and throw its waters back on another's property to its injury, and the culvert or opening must be sufficient to accommodate, not only the natural and normal flow of the stream, but such abnormal and excessive flow as may reasonably be anticipated in times of high water and flood, but there is no duty to provide for floods so unusual and extraordinary as to bring them within the category of "an act of God."

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 681, 682.]

2. Waters and Water Courses (§ 171 (2)*)—"Extraordinary" Flood, Defined.—An extraordinary flood, for the injury caused by which in combination with an obstruction placed in the stream, the owner of struction is not liable, is one which men of ordinary prudence would not have anticipated and provided for, and a flood is not extraordinary which is such as residents of the neighborhood might expect from their observation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extraordinary. For other cases, see 16 Va.-W. Va. Enc. Dig. 1268.]

3. Municipal Corporations (§ 847 (7)*)—Evidence Held to Sustain Verdict for $10,000 for Damage by Flood, Due to Negligence in Constructing Culvert.—In an action for damages to a building and land from an overflow of a water course by reason of alleged negligence of city in constructing a culvert, evidence held to sustain verdict for $10,000.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 208.]

4. Appeal and Error (§ 221*)—Objection to Method of Proving Damage Must Be Made on Trial.—In an action for damages to a building and land by flood, defendant could not object for the first time after verdict to plaintiff's method of proving damage, whereby he based the estimate of his damage upon a difference between the value of the property before and after the injury, even though such method of calculation was improper.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 564.]

5. Damages (§ 62 (3)*)—Owner of Property Damaged by Flood One Year Held Entitled to Damage by Flood Following Year, though

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

He Did Not Rebuild a Wall.—In an action against a city to recover damages resulting to building and land from an overflow of a creek caused by negligence of city in maintaining improper culverts, the damage to the building occurring in one year and the damage to the land the following year, held that there was no merit to a contention that plaintiff ought not to be allowed to recover anything for damage to land itself because he did not, after the first flood had thrown down the walls of the building, take steps to prevent further damage by rebuilding a wall along the water's edge; such contention being a misconception of the general rule that a plaintiff must do what he can, reasonably, to minimize the damage which he claims for a breach of contract or for a tort, since plaintiff was not bound to anticipate and provide against future wrong.

6. Negligence (§ 63*)—Act of God, Mingled with Negligence, No Defense.—When the negligence of a defendant mingles with an act of God in the production of an injury, the latter does not constitute a defense.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 372.]

7. Waters and Water Courses (§ 171 (2)*)—Instruction on Extraordinary Flood Held Proper.—In an action against a city for injury to a building and land by flood, alleged to have been occasioned by improper culverts, court did not err in striking out of an instruction the words: "The court tells the jury that a storm or freshet need not be unprecedented to be extraordinary and unusual, but may be so, although a similar storm or freshet may have occurred in each of two or three successive years."

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 682.]

8. Municipal Corporations (§ 845 (6)*)—Instruction as to Duty of City as to Culverts Held Proper.—In an action against a city to recover for injuries to a building and land caused by flood alleged to have been occasioned by improper culverts, held that the court did not err in adding to an instruction requested by defendant, to the effect that the city, having constructed adequate culverts sufficient in size at time of their construction, could not be held liable for not taking down and rebuilding, except for certain reasons, the words, "or unless the jury believe from the evidence that the city had by its improvements in providing for the growth of the city materially increased the volume and flow of the water under said arches."

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 676.]

9. Municipal Corporations (§ 832*)—Duty to Maintain Proper Culverts Continuing One.—The duty of a municipal corporation with respect to culverts to take care of surface water coming through a natural drain does not end with the original installation, but is a

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

continuing one, to be exercised with due regard to changed conditions affecting the flow of water to be accommodated by the culverts.

10. Municipal Corporations (§ 831 (1)*)—City Cannot Wait until Experience Demonstrates Inadequacy of Culverts.—Even though arches and culverts over natural drains were originally adequate, the city could not wait until experience demonstrated their inadequacy by floods before making changes necessary to protect the property of landowners, if the city could reasonably be charged with knowledge that its own operations had so materially increased the flow to be expected in times of flood as to render the outlets insufficient.

11. Appeal and Error (§ 1064 (1)*)—Erroneous Instruction in Action against City for Damages Held Not Prejudical.—An instruction concerning powers and duties of city with reference to the bed of a creek and protection of abutting property owners, although it went further than was either necessary or proper, held so plainly directed in its main purpose to the plaintiff's case and to conditions affecting the bed of the stream under the streets and the capacity of the arches as to have been free from any probability of error prejudicial to the city, in an action against the city for damages.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 584.]

12. Municipal Corporations (§ 827 (3)*)—Ordinary Care of City in Constructing Culverts Depends upon Judgment of Skilled Engineers.—Ordinary care, as applied to the rule that a city in constructing culverts over natural drains must make reasonable provision in respect to the arches so as not to flood lands of abutting owners, depends upon the judgment of skilled engineers, since, where one is charged with the conduct of matters requiring special skill and knowledge, it is not reasonable care to depend upon the judgment of unskilled persons.

13. Trial (§ 105 (1)*)—Plaintiff, Permitted to Prove Damages by Improper Method, Held Entitled to Instruction Accordingly.—Where plaintiff, without objection or contradiction on the part of the defendant, has been allowed to use an improper method of proving damage to property, he is entitled to an instruction accordingly, and may prove damages, where there is evidence of probative value.

14. Municipal Corporations (§ 845 (4)*)—Blueprints and Reports of City Engineers Held Admissible to Show that Culverts Were Too Small.—In an action against a city to recover damages for injuries to a building and land by flood claimed to have been caused by improper culverts over natural drains, it was proper to permit plaintiff to introduce in evidence reports and blueprints, made by engineers of the city, tending to show the city's knowledge of conditions with refer-

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ence to the creek and the territory drained by it, which had a direct bearing upon the adequacy of the culverts.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 765.]

Error to Law and Equity Court of City of Richmond.

Action by W. A. Cheatwood against the City of Richmond. Judgment for plaintiff, and the defendant brings error. Affirmed.

H. R. Pollard and *Geo. Wayne Anderson,* both of Richmond, for plaintiff in error.

Scott & Buchanan and *Gunn & Mathews,* all of Richmond, for defendant in error.

STANDARD OIL CO. OF NEW JERSEY *v.* ROBERTS.

June 16, 1921.

[107 S. E. 838.]

1. Municipal Corporations (§ 706 (8)*)—Instruction submitting Question of Proximate Cause Held Erroneous.—In an action for injuries sustained by a street car passenger in collision with rear end of defendant's wagon, while the passenger was standing on the running board of the trailer car, in which the defendant claimed that the passenger, in standing on running board in violation of an ordinance, was contributorily negligent, and that such negligence proximately contributed to injury precluding recovery, an instruction that defendant was liable if his negligence was "the sole proximate cause," without reference to defendant's contention that the passenger was himself negligent, and that such negligence was a proximate or concurring cause, held erroneous.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 413, 414.]

2. Municipal Corporations (§ 705 (4)*)—Violation of Ordinance Is Negligence as a Matter of Law.—A passenger who stands on the running board of an open street car in violation of an ordinance is negligent as a matter of law, precluding recovery for injuries sustained in a collision to which such negligence proximately contributed.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 362.]

3. Municipal Corporations (§ 706 (7)*)—Whether Negligence of Street Car Passenger in Standing on Running Board in Violation of an Ordinance Proximately Contributed to Collision Held for Jury.—In an action for injuries to a street car passenger sustained in collision

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.